72-839 FILE COPY

FILED
DEC 7 1972
MICHAEL RODAK JR. CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1972

No. 72-839

ROSEBUD WILLIAMS

Petitioner,

versus

MISSISSIPPI EXPORT RAILROAD

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JAMES B. RAMSEY,
Attorney for Petitioner,
RAMSEY, BODRON & THAMES
First National Bank Bldg.
Vicksburg, Mississippi
39180

Of Counsel:
WILLIAM W. RAMSEY
Vicksburg, Miss.,
and
DONALD CUMBEST,
Pascagoula, Miss.

I N D E X

	Page
Citations	i
Opinions below	1
Jurisdiction	2,3
Questions presented	3,4
Statutes involved	4
Statement of case	4-8
Reasons for granting writ	8-15
Conclusion	16
Certificate of Service	16
Appendix	17-26

CITATIONS - Page 1

Cases:	Page
Anderson vs Atchison T. & S. F. R. Co., 333 U. S. 821 (1948) ----------	15
Bailey vs Central Vermont Railway Co., 319 U. S. 350 (1943) ----------	12
Carter vs Atlantic & St. A. B. R. Co., 338 U. S. 430 (1949) ----------	15
Lavender vs Kurn, 327 U. S. 645 (1946) ----------	9,11
Lillie vs Thompson, 332 U. S. 459 (1947) ----------	15
Myers vs Reading Co., 331 U. S. 477 (1947) ----------	15
Rodicker vs Illinois Central Railroad Co., 400 U. S. 1012 (1971) ----------	14
Rogers vs Missouri Pacific Railway Co., 352 U. S. 500 (1957) ----------	3,8, 9,25
Schutz vs Pennsylvania R. Co., 350 U. S. 523 (1956) ----------	15
Stone vs New York C. & St. L. R. Co., 344 U. S. 407 (1953) ----------	15
Tennant vs P. U. Railway Co., 321 U. S. 21 (1944) ----------	10
Tiller vs Atlantic Coast Line Railroad Co., 318 U. S. 54 (1943) --------	8,25

CITATIONS - Page 2

	Page
Cases (Cont.)	
Wilkerson vs McCarthy, 336 U. S. 53 (1949) ----------	13,15
Statutes:	
Federal Employers' Liability Act 45 U.S.C.A. §51 ----------	2,3
Miscellaneous:	
United States Supreme Court Rules: Rule 19 ----------	2

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

ROSEBUD WILLIAMS

Petitioner,

versus

MISSISSIPPI EXPORT RAILROAD

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Mississippi entered in the above entitled cause on June 19, 1972 and the order of said court denying Petition for Rehearing on September 12, 1972.

OPINIONS BELOW.

The opinion of the Supreme Court of Mississippi was rendered on June 19, 1972 and is printed in Appendix A hereto, infra, page 17. This case may be found at 266 So. 2d 28. The decision of the Supreme Court of Mississippi overruling the petition for rehearing and denying a rehearing, thus making its judgment final, dated September 12, 1972 was handed down without written opinion.

JURISDICTION.

The jurisdiction of this court is invoked under Title 28 of the United States Code, chapter 81, Section 1257 (3). Rule 19, 1(a) of the Revised Rules of the Supreme Court of the United States governs the class of case presented here.

The Federal statute involved here is the Federal Employers' Liability Act, 45 United States Code Annotated, Section 51, page 150, which reads as follows, to-wit:

"Section 51. Liability of Common Carriers by Railroad in interstate or foreign commerce for injuries to employees from negligence; definition of employees.

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories, and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for negligence of any of the officers, agents, or employees of such carrier, or by

reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

Apr. 22, 1908, c. 149, §1, 35 Stat. 65; Aug. 11, 1939, c. 685, §1, 53 Stat. 1404."

The judgment of the Supreme Court of Mississippi was rendered on June 19, 1972. A petition for rehearing was timely filed and the petition was overruled and a rehearing denied on September 12, 1972. A copy of the judgment is attached to this petition as Appendix A.

QUESTIONS PRESENTED.

Did the Supreme Court of the State of Mississippi usurp the traditional function and province of the jury in reversing the jury's verdict and rendering judgment in favor of the Respondent?

Did the Supreme Court of the State of Mississippi commit reversible error in failing to apply the standards set forth by the United States Supreme Court in Rogers v. Missouri-Pacific Railroad Company, the "reasonableness test" wherein the United

States Supreme Court concluded in the Rogers case that if the proofs justified with reason that employer negligence played any part, even the slightest, in producing injury the test under the Federal Employers' Liability Act has been met?

STATUTE INVOLVED.

There is here involved the Federal Employers' Liability Act, Section 51, Title 45, United States Code Annotated.

STATEMENT OF CASE

This suit under the Federal Employers' Liability Act arose from a personal injury sustained by the Petitioner, Rosebud Williams, on April 10, 1968. The basic facts are as follows:

Rosebud Williams, the Petitioner, (a Negro male) was an adult resident citizen of Mississippi at the time of the injury. The Mississippi Export Railroad Company, the Respondent, was a railroad corporation doing business in Mississippi and involved also in interstate commerce. The Petitioner had been employed by the Respondent since December 16, 1952. (R-245) The Petitioner was injured while performing the duties of a section crew laborer in the maintenance of way department of the Respondent. (R-251)

The Petitioner was part of a crew of five Negro track laborers on April 10, 1968 that traveled by a railroad motorcar to a side track South of Moss Point, Mississippi, to perform the duty of unloading crossties from a gondola type railroad car. (R-247) The Petitioner and the other crew members were instructed by the section foreman, W. O. Carpenter,

to commence unloading the gondola. (R-250) The Petitioner stated that the work was begun with four men inside the car handling each crosstie with the fifth man on the ground stacking; however, the section foreman issued orders for the men to refrain from using four to a crosstie and shift two men to each end of the car resulting in two men to a crosstie. (R-250)

After several hours work the Petitioner in the process of shoving a crosstie from the gondola tripped on the metal bands or wire used to strap the crossties and fell. (R-251) An injury resulted to the Petitioner for which this suit was instituted.

Suit was initiated in the 1971 April Term of the Circuit Court of Jackson County, Mississippi, and the Petitioner sought damages in the amount of Two Hundred Fifty Thousand ($250,000.00) Dollars. (R-21-22) The Petitioner further charged in the declaration that the Respondent had an absolute, continuing and non-delegable duty to exercise reasonable care to furnish the Petitioner with a safe place to work and to furnish a sufficient number of employees to perform the duties required by the Respondent. (R-19)

During the course of the trial proceedings, the Petitioner stated on direct examination that the weight of a crosstie was approximately 350-400 pounds. (R-252) Also, the Petitioner testified that four men should be used on each crosstie for safety. (R-253) On cross-examination the Petitioner stated that he did not remember if the crossties were strapped with the metal bands or wire upon his arrival at the gondola and that he did not personally cut the straps. (R-292)

A witness and crew member, Robert James Smith, testified that each crosstie weighed approximately 300 pounds. (R-376) On cross-examination Smith said that he and the Petitioner had cut the metal bands. (R-381) Smith also stated that two men to a crosstie was normal procedure. (R-384)

Another witness and crew member, Willie Moore, asserted that the crossties weighed from 300-450 pounds. (R-393) Moore also testified that four men were required to safely perform the job of unloading crossties. (R-394)

Leroy McMillian, another witness and crew member declared that the crossties weighed 300 pounds. (R-403) It should be noted that at this juncture the Petitioner rested and the following day the Respondent presented the Defendant's case.

The Respondent called Leroy McMillian who had been a witness for the Petitioner and McMillian changed his testimony and he asserted that the weight of a crosstie was not 350 pounds but only 165 pounds. (R-462) McMillian further stated that after his original testimony he went with three company officials of the Respondent to a weight scale and actually weighed a crosstie and then changed his testimony. (R-464) Next, the Respondent called Robert James Smith to testify and he also changed his testimony and asserted that the crossties weighed 160 pounds instead of 300 pounds. (R-466)

Respondent's witness W. O. Carpenter on cross-examination admitted that it was the usual practice to use three men to the tie in unloading them. (R-479) This was clearly an admission on the part of the Respondent that the Respondent furnished the Petitioner with

insufficient help in the handling of the ties.

The Supreme Court stated in its opinion in the instant case that Rosebud Williams cut the banding wire based on the testimony of Robert Smith. Rosebud in his testimony, however, denied that he did so. (R-292) The Court concluded from the conflicting evidence that Rosebud did so. The jury apparently concluded the opposite. The Court concluded in its opinion that the crosstie weighed 160 pounds although there was evidence to the contrary that it weighed as much as 400 pounds. (R-252) The jury apparently concluded the contrary. The Court concluded that the Petitioner was negligent and that his own negligence caused his injury. The jury concluded the contrary. The Court concluded neither the weight of the crosstie nor the number of men handling it had anything whatsoever to do with the Petitioner's injury. The jury obviously concluded the contrary. The Court concluded that the Petitioner carelessly left the banding wire on the floor of the gondola. The jury obviously concluded the contrary. The Court concluded that the evidence did not preponderate in favor of the Petitioner. The question of preponderance of the evidence in cases under the Act has universally been held to be for the jury. The jury in this case obviously concluded that the evidence preponderated in favor of the Petitioner and returned a verdict reflecting this finding.

Following closing arguments the Court instructed the Jury. The Jury returned a verdict for the Petitioner and assessed his damages at Fifty Thousand ($50,000.00) Dollars. The Respondent promptly appealed to the Mississippi Supreme Court and the lower Court decision was reversed and judgment was rendered for the Respondent. The Mississippi

Supreme Court in discussing the standard of care in Federal Employers' Liability cases relied upon Tiller v Atlantic Coast Line Railroad Company, 318 U. S. 54 (1943) and said that this case established that the standard of care must be commensurate with the danger involved. The Mississippi Supreme Court also cited Rogers v Missouri-Pacific Railroad Company, 352 U.S. 500, (1957), emphasizing that even though "slightest negligence" was the rule that even this must be proven by the preponderance of the evidence and concluded as a matter of law that the Respondent was not guilty of any negligence whatsoever.

Upon Petition for rehearing Petition was denied and judgment entered for Respondent on September 12, 1972.

REASONS FOR GRANTING WRIT

The decision below should be reviewed because it erroneously encroached upon the province of the Jury as defined by the intentions of Congress in Federal Employers' Liability Act affairs. The Mississippi Supreme Court as reflected in its opinion totally ignored and failed to follow precedences firmly established by years of litigation in this field. Result, the railroad employees in Mississippi, including the Petitioner, do not have the same benefits of the Federal Employers' Liability Act as employees in other states.

It has long been universally recognized by both the federal and state Courts that historically the jury is the trier of the facts. Courts are not free to reweigh the evidence and set aside the jury's verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more

reasonable.

A jury trial is an integral part of the remedy afforded railroad workers under these statutes and to deprive them of a jury trial in a close or doubtful case takes away much of the relief the Congress intended to give them. The following are examples of usurpation of the jury function by the Mississippi Supreme Court in the instant case:

1. The Appellate Court concluded, even though the evidence was contradictory, that the Petitioner and other crew members were solely responsible for cutting the metal bands that secured the crossties.

2. The Appellate Court concluded, again upon contradictory testimony that the Petitioner applied the maul that cut the metal bands which subsequently tripped the Petitioner leading to the litigation.

3. The Appellate Court also concluded that neither the weight of the crossties nor the number of men working in the crew had anything to do with the injury of the Petitioner, again based upon contradictory evidence.

Apparently the Court below went beyond or failed to apply the decisions of this Court in Rogers v Missouri-Pacific Railway Company, 352 U.S. 500, (1957) and Lavender v Kurn, 327 U.S. 645, (1946). In the instant case the evidence is unquestionably contradictory in nature; however, the Mississippi Supreme Court refused to apply, or failed to apply, the "reasonableness test" established by this Court in Rogers vs Missouri Pacific Railway Company, 352 U. S. 500, (1957), stated as follows on pages 506-507:

> [6-8] Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities. The statute expressly imposes liability upon the employer to pay damages for injury or death due "in whole or in part" to its negligence.

The searching of the record by the Mississippi Supreme Court for conflicting and contradictory evidence in the instant case differs with the rulings of the United States Supreme Court. The rule concerning searching of the record was established by this Court in the decision in Tenant v P.U. Railway Company, 321 U. S. 21, (1944) in which the Court says at page 35:

> [6-8] It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point

> of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the Court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. Washington & Georgetown R. Co. v. McDade, 135 U. S. 554, 571, 572, 10 S. Ct. 1044, 1049, 34 L.Ed. 235; Tiller v. Atlantic Coast Line R. Co., supra, 318 U.S. 68, 63 S.Ct. 451, 143 A.L.R. 967; Bailey v. Central Vermont Ry., 319 U.S. 350, 353, 354, 63 S.Ct. 1062, 1064, 87 L.Ed. 1444. That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.

If there was a reasonable basis upon which the jury could find negligence on the part of the Respondent, the fact that other evidence might provide another non-negligent cause of injury does not allow the Appellate Court to interfere with the jury. This principle is established in Lavender vs Kurn, 327 U.S. 645, (1946) beginning at page 652:

> "Under these circumstances, it would be an undue invasion of the jury's historic function for an Appellate Court to weigh conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury."

Congress manifested a volition to provide railroad employees with a jury trial in as many situations as possible. Close cases were even submitted to the jury and the Mississippi Supreme Court position in the instant case is again contrary to this well established rule promulgated in Bailey v Central Vermont Railway Company, 319 U.S. 350, (1943), quoting at page 354:

> [7] The right to trial by jury is "a basic and fundamental feature of our system of federal jurisprudence." Jacob v. New York City, 315 U.S. 752, 62 S.Ct. 854, 86 L.Ed. 1166. It is part and parcel of the remedy afforded railroad workers under the Employers' Liability Act. Reasonable care and cause and effect are as elusive here as in other fields. But the jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries. That method of determining the liability of the carriers and of placing on them the cost of these industrial accidents may be crude, archaic, and expensive as compared with the more modern systems of workmen's compensation. But however inefficient and backward it may be, it is the system which Congress has provided. To deprive these workers of the benefit of a jury trial in close or doubtful

cases is to take away a goodly portion of the relief which Congress has afforded them.

A further question concerning the position of the lower Court in relation to this Court is in the area of negligence. The Mississippi Supreme Court reviewed the conflicting evidence and concluded not that the decision of the trial Court was wrong because of the unreasonableness of the decision, but simply that no negligence existed. In light of Wilkerson vs McCarthy, 336 U. S. 53, (1949), this stand by the Mississippi Supreme Court appears tenuous especially in view of the wording of the decision set forth at page 55 as follows:

> [1] The opinion of the Utah Supreme Court strongly indicated, as the dissenting judge pointed out, that its finding of an absence of negligence on the part of the railroad rested on that court's independent resolution of conflicting testimony. This Court has previously held in many cases that where jury trials are required, courts must submit the issues of negligence to a jury if evidence might justify a finding either way on those issues. See, e.g. Lavender vs Kurn, 327 U.S. 645, 652, 653, 66 S.Ct. 740, 743, 744, 90 L.Ed.916; Bailey v. Central Vermont Ry., 319 U.S. 350, 354, 63 S.Ct. 1062, 1064, 1065, 87 L.Ed. 1444; Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54, 68, 63 S.Ct. 444, 451, 452, 87 L.Ed. 610, 143 A.L.R. 967; and see Brady v. Southern R. Co., 320 U.S. 476, 479, 64 S.Ct. 232, 234, 88 L. Ed. 239. It was because of the importance of preserving for litigants in FELA cases their right to a jury

trial that we granted certiorari in this case.

The decision of the Mississippi Supreme Court in the instant case and in other Federal Employers' Liability Act cases is far reaching in its effect upon a class of people in Mississippi, railroad employees. A squeeze is being effectuated quite effectively upon the Congressionally expanded rights of hundreds of railroad employees in Mississippi. Justice Black in a dissenting opinion in Rodicker vs Illinois Central Railroad Company, 400 U. S. 1012, (1971) in which this Court denied a petition for a writ of certiorari to the Mississippi Supreme Court had apparently perceived the problem:

> This is a tragic case in which a twenty-three-year-old railroad worker was permanently and totally disabled while performing his duties. He has been denied his right to recover damages by what I believe was the gross error of the Mississippi Supreme Court in depriving him of his constitutional right to a jury trial.

Further Justice Black said at Page 1013:

> I think it is of paramount importance that the purpose of Congress to protect people like petitioner should not be frustrated by the will of judges. I would grant certiorari and reverse the judgment of the court below.

Time has come for this Court to review the application of the Mississippi Supreme Court's interpretation of the Federal Employers' Liability Act. This Court has repeatedly

emphasized the function of the jury in these cases; however, this Court has also demonstrated a willingness to review those decisions wherein this province was abused. This Court found that a jury question was presented, and reversed in the following cases:

1. Schulz v. Pennsylvania R. Co., 350 U.S. 523. (1956)

2. Stone v. New York, C. & St. L. R. Co., 344 U. S. 407. (1953)

3. Carter v. Atlanta & St. A. B. R. Co., 338 U.S. 430. (1949)

4. Wilkerson v. McCarthy, 336 U.S. 53. (1949)

5. Anderson v. Atchison, T. & S. F. R. Co., 333 U. S. 821. (1948)

6. Lillie v. Thompson, 332 U.S. 459. (1947)

7. Myers v. Reading Co., 331 U.S. 477. (1947)

Admittedly what occurred on April 10, 1968 is hazy and uncertain because of the conflicting testimony; however, the jury properly performed their duty under the scrutiny of the trial judge as set forth under the Federal Employers' Liability Act and there was no basis under the Act for the actions of the Mississippi Supreme Court.

CONCLUSION.

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES B. RAMSEY,
Attorney for Petitioner,
RAMSEY, BODRON & THAMES
First National Bank Building,
Vicksburg, Mississippi 39180

Of Counsel:
WILLIAM W. RAMSEY
Vicksburg, Mississippi
and
DONALD CUMBEST,
Pascagoula, Mississippi

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari to the Supreme Court of the State of Mississippi was served upon opposing counsel, by United States mail, postage prepaid, this 6th day of December, 1972.

APPENDIX "A".

IN THE SUPREME COURT OF MISSISSIPPI

No. 46,690

ROSEBUD WILLIAMS

versus

MISSISSIPPI EXPORT RAILROAD

ROBERTSON, JUSTICE:

Rosebud Williams, a male, sued the Mississippi Export Railroad Company in the Circuit Court of Jackson County under the Federal Employers' Liability Act for injuries sustained by him on April 10, 1968, when he tripped over a banding wire while unloading railroad crossties from a gondola car. The jury returned a verdict for $50,000.00 and the Railroad Company appeals.

Plaintiff testified that he began work for defendant as a section laborer on December 16, 1952; that he had been working for defendant about 16 1/2 years when he was retired because of sinus trouble and a degenerative back condition. Prior to working for defendant he had worked as a section laborer for the Columbus-Greenville Railroad Company, Gulf Mobile and Ohio Railroad Company and Southern Pacific Railroad Company.

One of his regular duties was unloading crossties. On April 10, 1968, along with 4 other section crewmen, he began to unload regular creosoted crossties from a low-side gondola car, which is an open car with sides

about four feet high. There were 383 crossties in this gondola car. They were bound together in lots of twelve with metal bands or wires, and it was the duty of the crewmen unloading them to cut these metal bands so that the crossties could be unloaded one by one.

Robert Smith and plaintiff were working as a team in the north end of the gondola car, and Leroy McMillian and Chambers White were working in the south end. Rosebud testified that he and Smith had a cleaver and a maul with which to cut the banding wires. Smith testified that he held the cleaver while Rosebud wielded the maul in cutting the metal bands binding the crossties. The procedure for unloading was for Smith to pick up one end of the 160-pound crosstie and place it on the side of the gondola car. Rosebud would pick up the other end and slide it over the side of the railroad car.

Rosebud testified:

> "While unloading the ties--there's band strapping in the car, I don't know whether it was a piece of wire, or one of the bands--Nevertheless, the ties was piled on the other end of them, and some of them was down under my feet. And I begun to run and sheve (sic) the tie off, and it caught me, caught my left leg and throwed me down in the car against some more ties, on my left side. And Robert, being with me, caught the tie."

Plaintiff complained to his fellow workers that he had hurt his back but he continued to work for the rest of the day. On the morning of April 11, he reported to his section foreman, W. O. Carpenter, that he had injured

his back. Carpenter sent him to Thompson's Clinic at Moss Point, where he was examined by Dr. Forrester. T. M. Von Sprecken, Jr., Vice-President and General Manager of Defendant, was called as an adverse witness by plaintiff and testified that the report from Thompson's Clinic was: "Sacro-sprain, and okay to go back to work on Monday, the 15th."

On April 15th, Rosebud returned to his regular job and worked in the same manner that he had in prior years.

He testified that he again injured his back in the same place about September 18, 1968, when in going to a grocery store near his place of work he jumped a ditch and twisted his back. He was 59 years of age at this time and had been working as a section hand for 24 years. On September 20th, he was sent to the hospital for x-rays.

Dr. Roberts of Thompson's Clinic testified:

> "Yes, the X-ray report says cervical spine shows degenerative disease, cervical vertebral body degenerated, C-6 and -7. cervical 6 and 7; lumbar spine showed degenerative disease, lumbar vertebral bodies, discs, narrowing at L-5 and S-1 level, the fifth lumbar and the first sacral level.
>
> "Q All right, sir. Now, that's degenerative disc disease that your talking about?
>
> "A Yes, sir.

"Q Then, Doctor, when was he returned to work; does your record show that is as a result of--

"A The September episode.

"He was seen again by Dr. Thompson on the 2nd of October. And the entry here says 'X rays, change consistent with degenerative disease,' aging. Able to return to work October 2nd."

Dr. Roberts further testified, without objection, as to an October 11, 1968, written report to Von Sprecken:

"This was written by Dr. Thompson. He had seen him at the time he was in the hospital and had his X rays made. The patient, in my opinion, has only an involvement in keeping with his age. However, in his type of work, it would be continuously bad on this condition. If he were being hired to new employment, it would probably be the same type of work. It's my opinion that this man can continue to work on his present job, keeping in mind that at an early time the degenerative process will proceed at a normal rate."

Dr. Roberts made another written report on April 16, 1969. He stated from the witness stand:

"Let's see. The above patient was examined by me on April 14, '69. After examining this patient and reviewing the X rays, I note the degenerative discs C-6 and -7 level, which means degenerated cervical and lumbosacral spine, minimal narrowing at the L-5 and S-1 level, due

to the type of disease of the cervical spine. It is my opinion he should be retired."

Plaintiff testified that he made a claim for Railroad Retirement Disability Benefits in April, 1969, and that he sent in Dr. Roberts' statement in support of his claim.

He was cross-examined about this:

"Q Well, his is the one that started the benefits, isn't it, the statement that he prepared and you sent into the Railroad Retirement Board?

"A He wasn't the one that started the benefits, 'cause when I started drawing it, I got off sick for something else.

"Q What were you sick with?

"A Something like the flu. In other words, it was sinus trouble.

"Q It was sinus trouble that you had?

"A That's right; and I started drawing from there.

"Q So, that is what you started the benefits on, was your sinus trouble?

"A Right."

Rosebud testified that his retirement pay was $154.00 every two weeks.

Plaintiff filed suit on June 24, 1970. In his declaration he alleged:

"Plaintiff would further show that

while attempting to unload the ties at the instruction and direction of the said W. O. Carpenter with inadequate and insufficient help, he was caused to severely, painfully and permanently injure his low back when he tripped over a banding wire while lifting one of the ties, causing him to fall on other ties in the car, severely, painfully and permanently injuring his low back."

Plaintiff charged the railroad company with negligence and carelessness "in failing and neglecting to furnish the Plaintiff with an adequate and sufficient number of co-workers to perform the work, and further by reason of the negligence and carelessness of the Defendant through its Section Foreman, W. O. Carpenter, in directing and instructing the Plaintiff and his co-workers to handle the work of unloading the crossties in an unsafe method or manner by directing that only two workers handle each tie when the said agent and employee of the Defendant knew, or through the exercise of reasonable care [should have known that this was] an insufficient number of employees to safely handle the said crossties, and by the further negligence and carelessness on the part of the Defendant in failing to exercise reasonable care to furnish the Plaintiff with a safe place to work by suffering, allowing and permitting the maintenance and existence of the loose steel tie bands in the gondola car where the Plaintiff was required to work, . . .

According to the Plaintiff, each crosstie weighed 350 to 400 pounds. Plaintiff was asked by his counsel:

"What's the normal number of men to be used in handling crossties of this weight?" (Emphasis added.)

To which, plaintiff responded:

"To do it safely, four men."

W. O. Carpenter, the section foreman, testified that these crossties weighed 160 pounds each, and later Robert Smith and Leroy McMillian testified that they actually witnessed the weighing of these regular crossties and they weighed 160 pounds each.

As to the usual and customary manner in which regular crossties were unloaded, Smith testified:

"Q Was that the usual and customary manner in which you unloaded ties?

"A Yes, sir, the only way you unloaded 'em.

"Q So, have you ever known of Mr. Carpenter, or any of the section crew, to use four men?

"A No, sir. When I started in, all we used was two.

"Q That's all you ever used, isn't it?

"A Yes, sir. If Mr. Carpenter used four men, it would have to be a switch tie, which is a great long one.

"Q And you can't put one of those sideways in a gondola like the one you were unloading"?

"A No, sir."

(Emphasis added)

Smith further testified as to his work with Plaintiff:

"Q How was the work divided up? Tell the Court and Jury what you all do, Robert, and how it happened.

"A We was unloading some crossties. He was tailing; I was putting 'em up, and he had to push 'em out. And he tripped over a bail wire."

"Q Now, Robert, on the date that you were there, and you were unloading these ties, were they strapped?

"A Yes, sir.

"Q The ties were strapped when you got there?

"A Yes, sir.

"Q Who broke the straps on those ties?

"A Me and him.

"Q How did you break the straps?

"A Took a maul, laid it down, and beat it up against there to break it.

"Q Did he do the beating, or did you?

"A He did the beating."

The United States Supreme Court in Tiller v. Atlantic Coast Line Railroad Company, 318 U.S. 54, 63 S.Ct. 444, 87 L.Ed. 610, 143 A.L.R. 967 (1943), outlined the standard to be used in FELA case:

> "In this situation the employer's liability is to be determined under the general rule which defines negligence as the lack of due care under the circumstances; or the failure to do what a reasonable and prudent man would ordinarily have done under the circumstances of the situation; or doing what such a person under the existing circumstances would not have done. A fair generalization of the rule is given in the Senate Committee report on the 1939 amendment: ' In justice, the master ought to be held liable for injuries attributable to conditions under his control when they are not such as a reasonable man ought to maintain in the circumstances.' Of course in any case the standard of care must be commensurate to the dangers of the business."
>
> (Emphasis added.) 318 U.S. at 67, 63 S.Ct. at 451, 87 L.Ed. at 617, 143 A. L. R. at 974.

[1] In Rogers v. Missouri Pacific Railroad Co., 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed. 2d 493 (1957), the United States Supreme Court said only slight negligence on the part of the defendant need be proved. But even that degree of negligence must be proved by a preponderance of the evidence. This the plaintiff failed to do. Plaintiff did not prove that defendant was guilty of any negligence whatsoever.

[2] The evidence was uncontradicted that plaintiff was an experienced railroad section hand; in fact, he himself testified that he had had 24 years experience in this work. The proof was undisputed that new creosoted crossties came banded together with metal bands or wire. The crew members were solely responsible for cutting these metal bands and getting them out of the way. Plaintiff claimed that he was injured when he tripped over a cut banding wire. Robert Smith, plaintiff's working companion, testified that plaintiff actually wielded the maul that broke the banding wire. Plaintiff cannot recover from his employer for injuries caused solely by his own negligence. It was his duty, and his alone, to cut and remove the banding wire. This he failed to do. It was his negligence that caused his injuries. Neither the weight of the crosstie nor the number of workmen handling it had anything whatsoever to do with the plaintiff tripping over a banding wire that he had carelessly left on the floor of the gondola car.

Even under the stringent rules of FELA, the defendant was entitled to a peremptory instruction. There was no proof whatsoever that the defendant was guilty of even the slightest degree of negligence.

The judgment is, therefore, reversed and judgment rendered for the defendant.

Reversed and rendered.

FILE COPY

DEC 7 1972

MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1972

SUPPLEMENTAL APPENDIX

No. 72-839

ROSEBUD WILLIAMS

Petitioner,

versus

MISSISSIPPI EXPORT RAILROAD

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

Of Counsel:
WILLIAM W. RAMSEY
Vicksburg, Miss.,
and
DONALD CUMBEST,
Pascagoula, Miss.

JAMES B. RAMSEY,
Attorney for Petitioner,
RAMSEY, BODRON & THAMES
First National Bank Bldg.
Vicksburg, Mississippi
39180

MISSISSIPPI EXPORT RAILROAD COMPANY

v.

ROSEBUD WILLIAMS.

No. 46690

Supreme Court of Mississippi.

June 19, 1972

Rehearing Denied September 12, 1972

Rosebud Williams, a male, sued the Mississippi Export Railroad Company in the Circuit Court of Jackson County under the Federal Employers' Liability Act for injuries sustained by him on April 10, 1968, when he tripped over a banding wire while unloading railroad crossties from a gondola car. The jury returned a verdict for $50,000.00 and the Railroad Company appeals.

Plaintiff testified that he began work for defendant as a section laborer on December 16, 1952; that he had been working for defendant about 16½ years when he was retired because of sinus trouble and a degenerative back condition. Prior to working for defendant he had worked as a section laborer for the Columbus-Greenville Railroad Company, Gulf Mobile and Ohio Railroad Company and Southern Pacific Railroad Company.

One of his regular duties was unloading crossties. On April 10, 1968, along with 4 other section crewmen, he began to unload regular creosoted crossties from a low-side gondola car, which is an open car with sides about four feet high. There were 383 crossties in this gondola car. They were bound together in lots of twelve with metal bands or wires, and it was the duty of the crewmen unloading them to cut these metal bands so that the crossties could be unloaded one by one.

Robert Smith and plaintiff were working as a team in the north end of the gondola car, and Leroy McMillian and Chambers White were working in the south end. Rosebud testified that he and

Smith had a cleaver and a maul with which to cut the banding wires. Smith testified that he held the cleaver while Rosebud wielded the maul in cutting the metal bands binding the crosstie. The procedure for unloading was for Smith to pick up one end of the 160-pound crosstie and place it on the side of the gondola car. Rosebud would pick up the other end and slide it over the side of the railroad car.

Rosebud testified:

> "While unloading the ties—there's band strapping in the car, I don't know whether it was a piece of wire, or one of the bands—Nevertheless, the ties was piled on the other end of them, and some of them was down under my feet. And I begun to run and sheve (sic) the tie off, and it caught me, caught my left leg and throwed me down in the car against some more ties, on my left side. And Robert, being with me, caught the tie."

Plaintiff complained to his fellow workers that he had hurt his back but he continued to work for the rest of the day. On the morning of April 11, he reported to his section foreman, W. O. Carpenter, that he had injured his back. Carpenter sent him to Thompson's Clinic at Moss Point, where he was examined by Dr. Forrester. T. M. Von Sprecken, Jr., Vice-President and General Manager of Defendant, was called as an adverse witness by plaintiff and testified that the report from Thompson's Clinic was: "Sacro-sprain, and okay to go back to work on Monday, the 15th."

On April 15th, Rosebud returned to his regular job and worked in the same manner that he had in prior years.

He testified that he again injured his back in the same place about September 18, 1968, when in going to a grocery store near his place of work he jumped a ditch and twisted his back. He was 59 years of age at this time and had been working as a section hand for 24 years. On September 20th, he was sent to the hospital for x-rays.

Dr. Roberts of Thompson's Clinic testified:

> Yes, the X-ray report says cervical spine shows degenerative disease, cervical vertebral body degenerated, C-6 and -7, cervical 6 and 7; lumbar spine showed degenerative disease, lumbar vertebral bodies, discs, narrowing at L-5 and S-1 level, the fifth lumbar and the first sacral level.

"Q All right, sir. Now, that's degenerative disc disease that you're talking about?

"A Yes, sir.

"Q Then, Doctor, when was he returned to work; does your record show that is as a result of—

"A The September episode.

"He was seen again by Dr. Thompson on the 2nd of October. And the entry here says 'X rays, change consistent with degenerative disease,' aging. Able to return to work October 2nd."

Dr. Roberts further testified, without objection, as to an October 11, 1968, written report to Von Spreeken:

"This was written by Dr. Thompson. He had seen him at the time he was in the hospital and had his X rays made. The patient, in my opinion, has only an involvement in keeping with his age. However, in his type of work, it would be continuously bad on this condition. If he were being hired to new employment, it would probably be the same type of work. It's my opinion that this man can continue to work on his present job, keeping in mind that at an early time the degenerative process will proceed at a normal rate."

Dr. Roberts made another written report on April 16, 1969. He stated from the witness stand:

"Let's see. The above patient was examined by me on April 14, '69. After examining this patient and reviewing the X rays, I note the degenerative diseased bodies, and degenerative discs C-6 and -7 level, which means degenerated cervical and lumboacral spine, minimal narrowing at the L-5 and S-1 level, due to the type of disease of the cervical spine. It is my opinion he should be retired."

Plaintiff testified that he made a claim for Railroad Retirement Disability Benefits in April, 1969, and that he sent in Dr. Roberts' statement in support of his claim.

He was cross-examined about this:

"Q Well, his is the one that started the benefits, isn't it,

the statement that he prepared and you sent in to the Railroad Retiremnt Board?

"A He wasn't the one that started the benefits, 'cause when I started drawing it, I got off sick for something else.

"Q What were you sick with?

"A Something like the flu. In order words, it was sinus trouble.

"Q It was sinus trouble that you had?

"A That's right; and I started drawing from there.

"Q So, that is what you started the benefits on, was your sinus trouble?

"A Right."

Rosebud testified that his retirement pay was $154.00 every two weeks.

Plaintiff filed suit on June 24, 1970. In his declaration he alleged:

> "Plaintiff would further show that while attempting to unload the ties at the instruction and direction of the said W. O. Carpenter with inadequate and insufficient help, he was caused to severely, painfully and permanently injure his low back when he tripped over a banding wire while lifting one of the ties, causing him to fall on other ties in the car, severely painfully and permanently injuring his low back."

Plaintiff charged the railroad company with negligence and carelessness "in failing and neglecting to furnish the Plaintiff with an adequate and sufficient number of co-workers to perform the work, and further by reason of the negligence and carelessness of the Defendant through its Section Foreman, W. O. Carpenter, in directing and instructing the Plaintiff and his co-workers to handle the work of unloadng the crossties in an unsafe method or manner by directing that only two workers handle each tie when the said agent and employee of the Defendant knew, or through the exercise of reasonable care [should have known that this was] an insufficient number of employees to safely handle the said crosstics, and by the further negligence and carelessness on the part of the Defendant in failing to exercise reasonable care to furnish the Plaintiff with a

safe place to work by suffering, allowing and permitting the maintenance and existence of the loose steel tie bands in the gondola car where the Plaintiff was required to work . . . . "

According to the Plaintiff, each crosstie weighed 350 to 400 pounds. Plaintiff was asked by his counsel:

"What's the normal number of men to be used in handling crossties *of this weight?*" (Emphasis added.)

To which, plaintiff responded:

"To do it safely, four men."

W. O. Carpenter, the section foreman, testified that these crossties weighted 160 pounds each, and later Robert Smith and Leroy McMillian testified that they actually witnessed the weighing of these regular crossties and they weighed 160 pounds each.

As to the usual and customary manner in which regular crossties were unloaded, Smith testified:

"Q Was that the usual and customary manner in which you unloaded ties?

"A Yes, sir, the only way you unloaded 'em.

.....

"Q So, have you ever known of Mr. Carpenter, or any of the section crew, to use four men?

"A *No sir, When I started in, all we used was two.*

"Q *That's all you ever used, isn't it?*

"A *Yes, sir. If Mr. Carpenter used four men, it would have to be a switch tie, which is a great long one.*

"Q And you can't put one of those sideways in a gondola like the one you were unloading?

"A No, sir."

(Emphasis added.)

Smith further testified as to his work with Plaintiff:

"Q How was the work divided up? Tell the Court and Jury what you all do, Robert, and how it happened.

"A We was unloading some crossties. He was tailing; I was putting 'em up, and he had to push 'em out. And he tripped over a bail wire."

.....

"Q Now, Robert, on the date that you were there, and you were unloading these ties, were they strapped?

"A Yes, sir.

"Q The ties were strapped when you got there?

"A Yes, sir.

"Q Who broke the straps on those ties?

"A Me and him.

.....

"Q How did you break the straps?

"A Took a maul, laid it down, and beat it up against there to break it.

"Q Did he do the beating, or did you?

"A He did the beating."

The United States Supreme Court in Tiller v. Atlantic Coast Line Railroad Company, 318 U.S. 54, 63 S.Ct. 444, 87 L. Ed. 610, 143 A.L.R. 967 (1943), outlined the standard to be used in FELA cases:

"In this situation the employer's liability is to be determined *under the general rule which defines negligence as the lack of due care under the circumstances;* or the failure to do what a reasonable and prudent man would ordinarily have done under the circumstances of the situation; or doing what such a person under the existing circumstances would not have done. A fair genrealization of the rule is given in the Senate Committee report on the 1939 amendment: *'In justice, the master ought to be held liable for injuries attributable to conditions under his control when they are not such as a reasonable man ought to maintain in the circumstances.' Of course in any case the standard of care must be commensurate to the dangers of the business.*" (Emphasis added.) 318 U.S. at 67, 63 S.Ct. at 451, 87 L.Ed. at 617, 143 A.L.R. at 974.

COPY BOUND TO

[1] In Rogers v. Missouri Pacific Railroad Co., 352 U.S. 500, 77 S.Ct. 443, 1 L Ed.2d 493 (1957), the United States Supreme Court said only slight negligence on the part of the defendant need be proved. But even that degree of negligence must be proved by a preponderance of the evidence. This the plaintiff failed to do. Plaintiff did not prove that defendant was guilty of any negligence whatsoever.

[2] The evidence was uncontradicted that plaintiff was an experienced railroad section hand; in fact, he himself testified that he had had 24 years experience in this work. The proof was undisputed that new creosoted crossties came banded together with metal bands or wire. The crew members were solely responsible for cutting these metal bands and getting them out of the way. Plaintiff claimed that he was injured when he tripped over a cut banding wire. Robert Smith, plaintiff's working companion, testified that plaintiff actually wielded the maul that broke the banding wire. Plaintiff cannot recover from his employer for injuries caused solely by his own negligence. It was his duty, and his alone, to cut and remove the banding wire. This he failed to do. It was his negligence that caused his injuries. Neither the weight of the crosstie nor the number of workmen handling it had anything whatsoever to do with the plaintiff tripping over a banding wire that he had carelessly left on the floor of the gondola car.

Even under the stringent rules of FELA, the defendant was entitled to a peremptory instruction. There was no proof whatsoever that the defendant was guilty of even the slightest degree of negligence.

The judgment is, therefore, reversed and judgment rendered here for the defendant.

Reversed and rendered.

TOO CLOSE IN CENTER